

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

JDO MEDIA, INC., a Florida corporation,
TONY LAMPERT, an individual,
TIMOTHY ROLAND, an individual, ERIK
SUMMERS, an individual, JOHN
MCLEOD, an individual, and JOHN DOES
5-50,

Defendants.

No. C04-0515P

SECOND AMENDED COMPLAINT
FOR DAMAGES AND INJUNCTIVE
RELIEF

Plaintiff Microsoft Corporation (“Microsoft”) brings this action against JDO MEDIA, INC., TONY LAMPERT, TIMOTHY ROLAND, ERIK SUMMERS, JOHN MCLEOD, and JOHN DOES 5-50.

I. JURISDICTION AND VENUE

1. This is an action for violations of the federal CAN-SPAM Act of 2003 (15 U.S.C. §7701 et seq.) and other state and federal causes of action. Passed by Congress and signed into law in December 2003, the CAN-SPAM Act is new, comprehensive legislation

SECOND AMENDED COMPLAINT FOR
DAMAGES AND INJUNCTIVE RELIEF - 1
CASE NO. C04-0515P

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1 aimed at curbing the growing abuse of unsolicited commercial electronic mail by e-mail
2 marketers.

3 2. In this action, Microsoft seeks damages and injunctive relief to remedy
4 defendants' unauthorized use of Microsoft's computers and computer systems to deliver
5 millions of misleading and deceptive commercial e-mail messages, or "spam," in violation of
6 federal and state law and Microsoft's policies.

7 3. Since January 1, 2004, the defendants have sent or have been responsible for
8 the sending of millions of illegal e-mail messages to Microsoft's e-mail subscribers,
9 advertising a multi-level marketing ("MLM") program. The MLM program itself instructs
10 members how to generate leads for the program, and for other products, through spam. The
11 e-mail messages are routed through open proxies, contain header information that is false and
12 misleading, contain misleading subject lines, and use other obfuscatory methods to disguise
13 the senders' identities.

14 4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28
15 U.S.C. § 1338(a). The Court has supplemental jurisdiction over the state law claims pursuant
16 to 28 U.S.C. § 1367.

17 5. The Court has personal jurisdiction over the Defendants, who have engaged in
18 business activities in and directed to Washington, have committed a tortious act within the
19 state, have used personal property in the state, and have purposefully availed themselves of
20 the opportunity to conduct commercial activities in this forum.

21 6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), because
22 substantial part of the events or omissions giving rise to the claims pled herein occurred in the
23 Western District of Washington.

1 **II. THE PARTIES**

2 7. Plaintiff Microsoft is a Washington corporation with its principal place of
3 business in Redmond, Washington.

4 8. Defendant JDO Media, Inc. (“JDO”) is a Florida corporation with its principal
5 place of business in Ocala, Florida.

6 9. Defendant Tony Lampert (“Lampert”) is an individual who resides in St.
7 Louis, Missouri.

8 10. Defendant Timothy Roland (“Roland”) is an individual who resides in San
9 Juan Capistrano, California.

10 11. Defendant Erik Summers (“Summers”) is an individual who resides in San
11 Clemente, California.

12 12. Defendant John McLeod (“McLeod”) is an individual who resides in Ocala,
13 Florida.

14 13. Microsoft is unaware of the true names and capacities of defendants sued
15 herein as DOES 5 - 50 and, therefore, sues these defendants by such fictitious names.
16 Microsoft will amend this complaint to allege their true names and capacities when
17 ascertained. Microsoft is informed and believes and therefore alleges that each of the
18 fictitiously named defendants is responsible in some manner for the occurrences herein
19 alleged, and that Microsoft’s injuries as herein alleged were proximately caused by such
20 defendants. These fictitiously named defendants, along with JDO, Lampert, Roland,
21 Summers, and McLeod are herein referred to as “defendants.”

22 14. The actions alleged herein to have been undertaken by the defendants were
23 undertaken by each defendant individually, were actions that each defendant caused to occur,
24 were actions that each defendant authorized, controlled, directed, or had the ability to
25 authorize, control or direct, and/or were actions each defendant assisted, participated in, or
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1 otherwise encouraged, and are actions for which each defendant is liable. Each defendant
2 aided and abetted the actions of the defendants set forth below, in that each defendant had
3 knowledge of those actions, provided assistance and benefited from those actions, in whole or
4 in part. Each of the defendants was the agent of each of the remaining defendants, and in
5 doing the things hereinafter alleged, was acting within the course and scope of such agency
6 and with the permission and consent of other defendants. Each of the defendants knew, or
7 consciously avoided knowing, that other defendants had or would engage in a pattern or
8 practice that violated the CAN-SPAM Act of 2003.

9 **III. NATURE OF MICROSOFT'S INTERNET E-MAIL SERVICES**

10 15. Microsoft owns and operates interactive computer services that enable its
11 customers to, among other things, access the Internet and exchange electronic mail ("e-mail")
12 on the Internet. Microsoft owns and maintains computers and other equipment, including
13 specialized computers or "servers" that process e-mail messages and otherwise support its
14 e-mail services. Microsoft maintains this equipment in Washington and California, among
15 other states. E-mail sent to and from Microsoft's customers is processed through and stored
16 on these computers. Microsoft is an internet service provider ("ISP"), a provider of "Internet
17 Access Service" as defined by 15 U.S.C. §7702(11), and an "interactive computer service" as
18 defined by RCW 19.190.010. Microsoft's computers and computer systems are "protected
19 computers" under the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030(e)(2).

20 16. One of Microsoft's services is "MSN Hotmail" which provides free and
21 subscription based e-mail on the Internet through a web-based e-mail service that can be
22 accessed at www.hotmail.com. MSN Hotmail allows account-holders to exchange e-mail
23 messages with any other e-mail user who has an Internet e-mail address throughout the world.
24 MSN Hotmail has millions of registered accounts, whose users all have unique e-mail
25 addresses ending in "@hotmail.com."

1 17. Another of Microsoft's services is "MSN Internet Access" (referred to herein
2 as "MSN") which provides free and subscription-based e-mail services that can be accessed
3 on the web or via Microsoft's proprietary network. MSN allows account-holders to exchange
4 e-mail messages with any other e-mail user who has an Internet e-mail address throughout the
5 world. MSN has millions of registered accounts, whose users all have unique e-mail
6 addresses ending in "@msn.com."

7 **IV. SPAM AND THE PURPOSES BEHIND THE FEDERAL CAN-SPAM ACT**

8 18. The United States Congress, in passing the CAN-SPAM¹ Act of 2003,
9 concluded that "[u]nsolicited commercial e-mail, commonly known as 'spam', has quickly
10 become one of the most pervasive intrusions in the lives of Americans." Indeed, Congress
11 estimated that by the end of 2003, if not sooner, spam would account for over 50% of all
12 e-mail. This is in sharp contrast to two years earlier when spam only accounted for 8% of all
13 e-mail. Congress has concluded that the rate at which spam is increasing is "reaching
14 critically high levels." In fact, in 2003, an estimated 2 trillion spam messages were expected
15 to be sent over the Internet.

16 19. In addition to plaguing recipients by its sheer volume, spam is also notoriously
17 deceptive in form and content. In April 2003, the Federal Trade Commission found that 66%
18 of all spam contains "some kind of false, fraudulent, or misleading information, either in the
19 e-mail's routing information, its subject line, or the body of its message." In fact, the FTC
20 found that "one-third of all spam contains a fraudulent return e-mail address that is included
21 in the routing information (known as the 'header') of the e-mail message." Congress found
22 that falsified headers "not only trick ISP's increasingly sophisticated filters," but also "lure
23 consumers into mistakenly opening messages from what appears to be people they know."
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26 ¹ CAN-SPAM is an acronym for "Controlling the Assault of Non-Solicited Pornography and
Marketing Act of 2003".

1 20. Congress also found that not only do spammers use false sender information,
2 but they also use false or misleading subject lines. According to Congress, the FTC found
3 that 42% of spam contains misleading subject lines that “trick the recipient into thinking that
4 the e-mail sender has a personal or business relationship with the recipient.” Congress
5 provided examples of this type of false or misleading subject line: “Hi, it’s me” and “Your
6 order has been filled.”

7 21. The economic impact of spam is enormous. Congress noted that a 2001
8 European Union study found that “spam costs Internet subscribers worldwide \$9.4 billion
9 each year.” Congress also noted that the estimated costs “to United States businesses from
10 spam in lost productivity, network system upgrades, unrecoverable data, and increased
11 personnel costs, combined, will top \$10 billion in 2003.” Of that amount, approximately \$4
12 billion will be associated with lost employee productivity.

13 22. With these findings as a backdrop, the United States Congress passed the
14 CAN-SPAM Act. In so doing, Congress provided four specific purposes of the Act:
15 “(i) prohibit senders of electronic mail (e-mail) for primarily commercial advertisement or
16 promotional purposes from deceiving intended recipients or Internet service providers as to
17 the source or subject matter of their e-mail messages; (ii) require such e-mail senders to give
18 recipients an opportunity to decline to receive future commercial e-mail from them and to
19 honor such requests; (iii) require senders of unsolicited commercial e-mail (UCE) to also
20 include a valid physical address in the e-mail message and a clear notice that the message is
21 an advertisement or solicitation; and (iv) prohibit businesses from knowingly promoting or
22 permitting the promotion of, their trade or business through e-mail transmitted with false or
23 misleading sender or routing information.”

24 23. As Congress recognized, the growth in unsolicited commercial electronic mail
25 imposes significant monetary costs on providers of Internet access services that carry and
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1 receive such mail, as there is a finite volume of mail that such providers can handle without
2 further investment in infrastructure. The sheer volume of spam is threatening to overwhelm
3 not only the average consumer's in-box, but also the network systems of Internet access
4 service providers.

5 24. Microsoft has invested substantial time and money in efforts to protect itself
6 and its equipment from spam and the spammers who promote and profit from spam, as well as
7 in efforts to protect its registered users worldwide from receiving spam.

8 25. Microsoft has a clearly articulated policy prohibiting the use of its services for
9 junk e-mail, spamming, or any unsolicited messages (commercial or otherwise). Microsoft's
10 policies also prohibit automated queries of any sort, harvesting or collection of e-mail
11 addresses, and any use of the services that is not personal and non-commercial. These
12 policies are included in the Terms of Use for MSN and MSN Hotmail, which can be accessed
13 via a clearly marked link on www.msn.com, as well as on the home pages for each of the
14 services.

15 **V. DEFENDANTS' UNLAWFUL CONDUCT**

16 26. Microsoft is informed and believes, and on that basis alleges, that defendants
17 have been—and are currently—involved in widespread spamming by sending misleading,
18 deceptive and unsolicited commercial e-mail to MSN Hotmail account holders.

19 27. Microsoft is informed and believes, and on that basis alleges, that defendants
20 own or operate a number of Internet domains, by which they advertise their products or
21 services including, but not limited to, the domains 1upautomated.com, oneupautomated.com,
22 my3minutemovie.org, automarketing.org, 3minutemiracle.org, clickforsuccess.org, [my-best-](http://my-best-offers.com)
23 offers.com, and kash4u.net.

24 28. Microsoft is informed and believes, and on the basis alleges, that its MSN
25 Hotmail service has received millions of unsolicited commercial e-mail messages from
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1 defendants advertising their domains, and offering products or services relating to their
2 automated multi-level marketing program.

3 29. Many of those e-mail messages contain false or misleading "From" lines. By
4 placing false names in place of the name of the true sender, defendants obscure the point of
5 origin and transmission path of the e-mail.

6 30. Many of those e-mail messages are sent through open proxies, or hijacked
7 computers, thereby disguising the true sender of the e-mail messages.

8 31. Many of those e-mail messages purport to originate from the hotmail.com and
9 msn.com domains when, in fact, they did not. Defendants did not have permission to use
10 Microsoft's hotmail.com and msn.com domain names in that fashion.

11 32. Many of defendants' commercial e-mails use fictional domain names or use
12 the domain names of other innocent third-parties. Microsoft is informed and believes, and on
13 that basis alleges, that defendants did not have permission to use those domain names.

14 33. Many of those e-mail messages contain false and misleading subject lines, for
15 example "Elite, Professional Invitation", "Warning!!! These three minutes could change your
16 life", and "This is your lucky day." In addition, many of these messages are sent with "high
17 priority."

18 34. Microsoft has been adversely affected by defendants' actions. As a result of
19 defendants' activities, Microsoft's computer equipment and servers were required to process
20 millions of improper spam e-mails, as well as "bounce back" e-mails which had been sent by
21 defendant to non-existent, out-dated or incorrect e-mail addresses. This significant number of
22 e-mails has taken up substantial amount of Microsoft's finite computer space, threatens to
23 delay and otherwise adversely affect MSN Hotmail subscribers in sending and receiving
24 legitimate e-mail, and has resulted in and continues to result in significant costs to Microsoft.

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COUNT I
(Violation of the Federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003—“CAN-SPAM” (15 U.S.C. § 7704(a)(1)))

35. Microsoft realleges paragraphs 1-34 of this Complaint as if fully set forth herein.

36. Defendants initiated the transmission, to protected computers, of commercial e-mail messages that contained, or were accompanied by, header information that is materially false or materially misleading.

37. Defendants' actions were willful and knowing.

38. Defendants intentionally paid for or provided other consideration to, or induced, another person to initiate a commercial electronic mail message on its behalf with actual knowledge, or by consciously avoiding knowing, whether such person is engaging, or will engage, in a pattern or practice that violates the CAN-SPAM Act.

39. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

40. Defendants' actions violated 15 U.S.C. § 7704(a)(1), and entitle Microsoft to injunctive relief, statutory damages and aggravated damages because of defendants' willful and knowingly violation of the CAN-SPAM Act.

COUNT II
(Violation of the Federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003—“CAN-SPAM” (15 U.S.C. § 7704(a)(2, 3 and 5)))

41. Microsoft realleges paragraphs 1-40 of this Complaint as if fully set forth herein.

42. Defendants engaged in a pattern or practice of initiating, to protected computers, commercial e-mail messages that:

1 a) contained subject headings that defendants knew, or reasonably should have known,
2 were likely to mislead a recipient, acting reasonably under the circumstances, about a material
3 fact regarding the contents or subject matter of the messages;

4 b) failed to contain a functioning return e-mail address or other Internet-based
5 mechanism, clearly and conspicuously displayed, that a recipient could use to submit a reply
6 e-mail message or other form of Internet-based communication requesting not to receive
7 future commercial e-mail messages from that sender at the e-mail address where the message
8 was received; and

9 c) failed to include a clear and conspicuous identification that the message was an
10 advertisement or solicitation, failed to provide a clear and conspicuous notice of the
11 opportunity to decline to receive further commercial electronic mail messages from the
12 sender; or failed to provide a valid physical postal address of the sender.

13 43. Defendants' actions were willful and knowing.

14 44. Defendants intentionally paid for or provided other consideration to, or
15 induced, another person to initiate a commercial electronic mail message on its behalf with
16 actual knowledge, or by consciously avoiding knowing, whether such person is engaging, or
17 will engage, in a pattern or practice that violates the CAN-SPAM Act.

18 45. As a result of defendants' actions, Microsoft has been damaged in an amount
19 to be proven at trial.

20 46. Defendants' actions violated 15 U.S.C. § 7704(a)(2), (a)(3) and (a)(5), and
21 entitle Microsoft to injunctive relief, statutory damages and aggravated damages because of
22 defendants' willful and knowingly violation of the CAN-SPAM Act.

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**COUNT III
(Trespass to Chattels)**

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47. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 46 above.

48. The computers, computer networks and computer services that constitute Microsoft's MSN Hotmail e-mail system are the personal property of Microsoft.

49. Defendants were aware that their actions were specifically prohibited by Microsoft's Terms of Service and/or were on notice that Microsoft did not authorize their actions in any way.

50. Defendants have knowingly, intentionally and without authorization used and intentionally trespassed upon Microsoft's property.

51. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

**COUNT IV
(Conversion)**

52. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 51 above.

53. Defendants have willfully interfered with and converted Microsoft's personal property, without lawful justification, as a result of which Microsoft has been deprived of possession and use of its property.

54. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

**COUNT V
(Violation of the Washington Commercial Electronic Mail Act (RCW Ch. 19.190) and
the Washington Consumer Protection Act (RCW Ch. 19.86))**

55. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 54 above.

1 names, or combinations thereof, or false designations of origin, or false or misleading
2 descriptions or representations of fact.

3 70. Defendants' activities involved interstate commerce in connection with goods
4 and services.

5 71. Defendants' conduct is likely to cause confusion, mistake, or deception as to
6 defendants' affiliations, connection, or association with Microsoft, or as to the origin,
7 sponsorship, or approval of their goods or services, or commercial activities.

8 72. Microsoft has been damaged by these acts in an amount to be proved at trial.
9 Microsoft is also entitled under the Act to injunctive and equitable relief against defendants.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Microsoft respectfully requests that the Court enter judgment against
12 defendants, jointly and severally, as follows:

13 1. That the Court issue temporary and permanent injunctive relief against
14 defendants, and that defendants, their officers, agents, representatives, servants, employees,
15 attorneys, successors and assignees, and all others in active concert or participation with
16 defendants, be enjoined and restrained from:

- 17 a) establishing any accounts with Microsoft's MSN or MSN Hotmail
18 services;
- 19 b) using Microsoft's computers and computer systems in connection with
20 sending commercial e-mail messages;
- 21 c) making unauthorized use of Microsoft's computers and computer
22 systems;
- 23 d) continuing to violate Microsoft's Terms of Service;
- 24 e) continuing to violate the CAN-SPAM Act of 2003, or the Washington
25 Commercial Electronic Mail Act; and
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1 f) assisting, aiding, or abetting any other person or business entity in
2 engaging in or performing any of the activities referred to in subparagraphs a) through
3 e) above.

4 2. That the Court award Microsoft actual damages, liquidated damages and
5 statutory damages, in amount to be proven at trial;

6 3. That the Court award Microsoft its attorneys' fees and costs incurred herein;
7 and

8 4. That the Court grant Microsoft such other or additional relief as is just and
9 proper.

10 DATED this 3rd day of December, 2004.

11 PRESTON GATES & ELLIS LLP

12
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1 **DECLARATION OF SERVICE**

2 I declare, under penalty of perjury, under the laws of the State of Washington, that on
3 December 3, 2004, I electronically filed the foregoing document, along with Praecipe to Issue
4 Summons, with the Clerk of the Court using the CM/ECF system, which will send
5 notification of such filing to the following:

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15 Signed this 3rd day of December, 2004, at Seattle, King County, Washington.

16 Rhonda Hinman
17 Rhonda Hinman, Legal Secretary